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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DREYER'S GRAND ICE CREAM, INC.,

No. 10-00317 CW

Plaintiff,

ORDER GRANTING IN  
PART AND DENYING  
IN PART DEFENDANT  
ICD'S MOTION TO  
DISMISS (Docket  
No. 10)

v.

ICE CREAM DISTRIBUTORS OF EVANSVILLE,  
LLC and SPIN CITY HOLDINGS, LLC,

Defendants.

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Plaintiff Dreyer's Grand Ice Cream, Inc. alleges that Defendants Ice Cream Distributors of Evansville, LLC (ICD) and Spin City Holdings, LLC have failed to pay balances due for ice cream products delivered. ICD moves to dismiss Plaintiff's claims. Spin City does not join ICD's motion.<sup>1</sup> Plaintiff opposes the motion. The motion was heard on April 29, 2010. Having considered oral argument and the papers submitted by the parties, the Court GRANTS ICD's motion in part and DENIES it in part.

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<sup>1</sup> At the time this motion was taken under submission, Spin City had not responded to Plaintiff's complaint. Since then, Spin City has filed a joint answer with ICD.

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## BACKGROUND

2       The following allegations are contained in Plaintiff's  
3 complaint.

4       In June, 2004, Defendants ICD and Spin City sought  
5 authorization to distribute Plaintiff's ice cream products in parts  
6 of Kentucky, Illinois and Indiana. On July 2, 2004, Defendants  
7 applied for credit from Plaintiff. By signing the application,  
8 Defendants agreed to the following provision:

9       Customer agrees to pay all amounts due under this  
10 agreement. In the event of non-payment, in addition to  
the principal amount due, interest on the unpaid balance  
11 of 18% per annum or 1.5% per month, reasonable attorney  
fees and court costs may be assessed.

12 Compl., Ex. A at 2. Plaintiff<sup>2</sup> sent Defendants a March 3, 2005  
13 letter indicating that it had approved their credit application.  
14 The letter stated that Defendants' account had been established  
15 under the following terms: "Open terms/Net 10 days." Compl., Ex. A  
16 at 3. The letter also explained that Defendants' payments were  
17 "due ten days from the date of invoice." Compl., Ex. A at 3.

18       Over the period that Defendants distributed Plaintiff's  
19 products, they accrued a balance due of \$233,081.21. Plaintiff  
20 sent Defendants a final invoice on January 19, 2006. Defendants'  
21 payment on this invoice was due no later than January 29, 2006.  
22 Defendants did not remit payment.

23       Plaintiff filed its complaint on January 22, 2010. It brings  
24 a claim for breach of contract and, in the alternative, claims for  
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26       <sup>2</sup> Although the letter states that "Edy's Grand Ice Cream"  
27 extended the credit to Defendants, it carries Plaintiff's  
letterhead.

1 an account stated, on an open book account and for goods sold and  
2 delivered.

## LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. Ashcroft v. Iqbal, \_\_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550 U.S. at 555).

19       Although the court is generally confined to consideration of  
20 the allegations in the pleadings, when the complaint is accompanied  
21 by attached documents, such documents are deemed part of the  
22 complaint and may be considered in evaluating the merits of a Rule  
23 12(b)(6) motion. Durning v. First Boston Corp., 815 F.2d 1265,  
24 1267 (9th Cir. 1987).

## DISCUSSION

26 ICD argues that Plaintiff's claims must be dismissed because  
27 they are time-barred by California's four-year statute of

1 limitations. In the alternative, ICD challenges the sufficiency of  
2 Plaintiff's allegations.

3 I. Claim for Breach of Contract

4 A. Statute of Limitations

5 Under California law, a claim "upon any contract, obligation  
6 or liability founded upon an instrument in writing" must be brought  
7 within four years from the date that the claim accrues. Cal. Civ.  
8 Proc. Code § 337(1).

9 Plaintiff bases its breach of contract claim on its credit  
10 agreement with ICD. Under the agreement, ICD agreed to "pay all  
11 amounts due" and, in a follow up letter, ICD was informed that it  
12 must make payment within "ten days from the date of invoice."  
13 Compl., Ex. A at 2-3.

14 Plaintiff alleges that ICD has an outstanding balance of  
15 \$233,081.21, which appears to be the sum of amounts due on multiple  
16 invoices. In its complaint, Plaintiff identifies only one  
17 invoice,<sup>3</sup> due on January 29, 2006, which falls within the  
18 limitations period. This invoice can therefore support Plaintiff's  
19 breach of contract claim. However, Plaintiff cannot recover for  
20 other unpaid invoices unless the limitations period for them did  
21 not begin to run until January 22, 2006 or thereafter.

22 Plaintiff argues that the statute of limitations was tolled as  
23 to these invoices until January 29, 2006, the date ICD's final  
24 invoice was due. Citing Romano v. Rockwell International, Inc., 14  
25 Cal. 4th 479 (1996), Plaintiff maintains that it was entitled to

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27 <sup>3</sup> In its opposition brief, Plaintiff asserts that this invoice  
was for \$34,392.58. Opp'n at 3.

1 wait until ICD failed to pay this last bill before treating ICD as  
2 having breached the credit agreement. In Romano, an employee  
3 plaintiff alleged that his employer terminated his employment  
4 without good cause in violation of a purported implied contract.  
5 Id. at 488. The parties disputed whether the alleged contract was  
6 breached when the employer notified the plaintiff that his  
7 employment would be terminated or when his employment was actually  
8 terminated. Id. at 488-91. In laying out the relevant legal  
9 principles, the court stated that

10 whether the breach is anticipatory or not, when there are  
11 ongoing contractual obligations the plaintiff may elect  
12 to rely on the contract despite a breach, and the statute  
13 of limitations does not begin to run until the plaintiff  
14 has elected to treat the breach as terminating the  
15 contract.

16 Id. at 489. It explained that, in cases involving "successive  
17 breaches of a continuing contractual obligation, . . . 'where the  
18 parties did not mutually abandon or rescind [the contract] upon a  
19 breach or successive breaches, the injured party could wait until  
20 the time arrived for a complete performance by the other party and  
21 then bring an action for damages for such breaches.'" Id. at 490  
22 (quoting Lambert v. Commonwealth Land Title Ins. Co., 53 Cal. 3d  
23 1072, 1078 (1991)). Thus, assuming that the implied contract  
24 existed, the court concluded that the duty to terminate the  
25 plaintiff's employment only for good cause "would constitute an  
26 ongoing obligation, and the plaintiff would have the right to elect  
27 whether to rely on the contract despite an initial breach -- even  
28 assuming the announcement of termination were regarded as  
constituting a present breach." Romano, 14 Cal. 4th at 490.

1 Because the plaintiff chose to continue working under the purported  
2 contract, despite the employer's alleged initial breach, the court  
3 held that the limitations period began at the time the plaintiff's  
4 employment was actually terminated, not at the time of  
5 notification. Id. at 491. The court explained that the  
6 plaintiff's decision tolled "the running of the statute of  
7 limitations until termination, because [he] continued to perform  
8 and accept compensation until the time of actual termination,  
9 reflecting an election to treat the contract as still in effect."  
10 Id. at 490.

11 Here, despite ICD's non-payment, Plaintiff apparently chose to  
12 continue extending credit to ICD under the agreement until January  
13 29, 2006. In doing so, as in Romano, Plaintiff gave ICD the  
14 opportunity to cure its earlier defaults on its obligation to pay,  
15 while both ICD and Plaintiff treated the contract as in effect.  
16 See Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co., Inc.,  
17 \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 668063, at \*6 (N.D. Cal.)  
18 (discussing Romano). When ICD failed to pay the final bill,  
19 Plaintiff then elected to treat the breach as terminating the  
20 credit agreement. Under Romano, Plaintiff was entitled to wait  
21 until January 29, 2006 to do so.

22 ICD attempts to distinguish Romano, arguing that there was no  
23 ongoing contractual obligation because it "was not obligated to  
24 receive a pre-set amount of product from Dreyer's." Reply at 3.  
25 Although this may be true, it is irrelevant; Plaintiff and ICD  
26 contracted for credit, not products. Under the agreement, ICD was  
27 obliged to pay amounts due for goods received, not to purchase

1 goods. The fact that it did not buy products would not have  
2 relieved it of paying for debts previously incurred. Indeed, ICD  
3 continued to receive goods pursuant to the credit agreement, even  
4 though it was defaulting on its duty to pay. To allow ICD to  
5 assert a statute of limitations defense, notwithstanding its  
6 conduct suggesting that the contract remained in force, would lead  
7 to an inequitable result.

8 ICD also appears to suggest that the purchase resulting in the  
9 January 16, 2006 invoice was not made pursuant to the credit  
10 agreement. It points out that, in a prior case before this Court,  
11 Plaintiff represented that, after December 30, 2005, ICD purchased  
12 "Dreyer's ice cream products via cash on delivery or wire transfer  
13 to service only its Walgreen's account." ICD's Request for  
14 Judicial Notice (RJN),<sup>4</sup> Ex. A at 5. However, this representation  
15 is not necessarily inconsistent with Plaintiff's allegation that  
16 the invoice was based on a purchase on ICD's credit account.

17 The statute of limitations on Plaintiff's breach of contract  
18 claim did not begin to run until January 29, 2006. Accordingly, by  
19 filing its complaint on January 22, 2010, Plaintiff timely  
20 initiated its claim.

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24       <sup>4</sup> ICD requests judicial notice of documents filed by Plaintiff  
25 in a prior action before this Court between Plaintiff and ICD. See  
generally Dreyer's Grand Ice Cream, Inc. v. Ice Cream Distributors  
of Evansville, 07-0140 CW (N.D. Cal.). Plaintiff does not oppose  
the request. Because the fact that Plaintiff made these statements  
in its earlier papers is not subject to reasonable dispute, the  
Court grants ICD's request. See Fed. R. Evid. 201.

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1           B.     Sufficiency of Pleadings

2           To assert a cause of action for breach of contract, a  
3 plaintiff must plead: (1) existence of a contract; (2) the  
4 plaintiff's performance or excuse for non-performance; (3) the  
5 defendant's breach; and (4) damages to the plaintiff as a result of  
6 the breach. Armstrong Petrol. Corp. v. Tri-Valley Oil & Gas Co.,  
7 116 Cal. App. 4th 1375, 1391 n.6 (2004).

8           ICD argues that Plaintiff cannot rely on its credit agreement  
9 for its breach of contract claim because it "does not state that  
10 any particular amount is supposed to be paid by ICD." Reply at 2.  
11 ICD maintains that the only enforceable contracts "are the actual  
12 invoices detailing amounts supposedly due." Reply at 2. This  
13 argument is unavailing. According to the complaint, the invoices  
14 were issued pursuant to the credit agreement. The letter notifying  
15 ICD of the approval of its application stated invoices were to be  
16 paid within ten days of receipt. ICD does not argue that it  
17 objected to this term. Thus, taking these documents together,  
18 Plaintiff sufficiently pleads that its credit agreement is an  
19 enforceable contract. Cf. Cal. Civ. Code § 1642 ("Several  
20 contracts relating to the same matters, between the same parties,  
21 and made as parts of substantially one transaction, are to be taken  
22 together.")

23           ICD also asserts that Plaintiff fails to state a claim because  
24 it "provides no facts as to when its final delivery of ice cream  
25 products to ICD occurred . . . ." Mot. at 4. No such pleading is  
26 required. Plaintiff avers that it extended credit and delivered  
27 its products pursuant to the agreement, which triggered ICD's duty

1 to pay within ten days of receiving an invoice. Plaintiff also  
2 avers that it has suffered damage as a result of ICD's failure to  
3 pay. These allegations sufficiently support Plaintiff's claim for  
4 breach of contract.

5 II. Claims for Account Stated, on an Open Book Account and for  
6 Goods Sold and Delivered<sup>5</sup>

7 A. Statute of Limitations

8 A four-year limitations period applies to actions "(1) upon a  
9 book account whether consisting of one or more entries; (2) upon an  
10 account stated based upon an account in writing, but the  
11 acknowledgment of the account stated need not be in writing; (3) a  
12 balance due upon a mutual, open and current account, the items of  
13 which are in writing." Id. § 337(2). In such actions, "where an  
14 account stated is based upon an account of one item, the time shall  
15 begin to run from the date of said item, and where an account  
16 stated is based upon an account of more than one item, the time  
17 shall begin to run from the date of the last item." Id.; see also  
18 R.N.C. Inc. v. Tsegeltos, 231 Cal. App. 3d 967, 972 (1991) (stating  
19 that the four-year limitations period "on a book account begins as  
20 of the last entry in the book account"). Thus, a party may recover  
21 for items entered into the account outside the limitations period,  
22 provided the account's last entry falls within it. Rosati v.  
23 Heimann, 126 Cal. App. 2d 51, 56 (1954) ("It follows that the

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24       <sup>5</sup> Plaintiff appears to plead these claims as an alternative to  
25 its breach of contract claim. See McBride v. Boughton, 123 Cal.  
26 App. 4th 379, 388 (2004); Armstrong Petroleum Corp. v. Tri-Valley  
27 Oil & Gas Co., 116 Cal. App. 4th 1375, 1396 n.9 ("Under California  
law, however, moneys due under an express contract cannot be  
recovered in an action on an 'open book account' in the absence of  
a contrary agreement between the parties.").

1 action may include items entered more than the statutory period  
2 prior to the entry of the last item.")

3 Because Plaintiff filed its complaint on January 22, 2010,  
4 these claims may proceed to the extent that they accrued or involve  
5 accounts in which the last entry was dated on or after January 22,  
6 2006.

7 B. Claim for Account Stated

8 To state a claim for an account stated, a plaintiff must plead  
9 "(1) previous transactions between the parties establishing the  
10 relationship of debtor and creditor; (2) an agreement between the  
11 parties, express or implied, on the amount due from the debtor to  
12 the creditor; (3) a promise by the debtor, express or implied, to  
13 pay the amount due." Zinn v. Fred R. Bright Co., 271 Cal. App. 2d  
14 597, 600 (1969); see also Sandy v. McClure, 676 F. Supp. 2d 866,  
15 880 (N.D. Cal. 2009) (citing Zinn).

16 Plaintiff pleads previous transactions between it and ICD,  
17 satisfying the first prong of this claim. Plaintiff also alleges  
18 that, under the credit agreement, ICD agreed to pay amounts due.  
19 However, Plaintiff does not plead facts to suggest that ICD  
20 expressly agreed that it owed \$233,081.21.<sup>6</sup>

21 Plaintiff appears to conflate the promise to pay with an  
22 agreement over the amount due, an issue addressed in Zinn. There,  
23 although prior transactions between the parties had been  
24 established and evidence demonstrated a promise by defendant to pay

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26 <sup>6</sup> Plaintiff avers that "the sum of \$233,081.21, plus interest  
27 was found to be due Dreyer's, which sum ICD and Spin City agreed  
and promised to pay." Compl. ¶ 18. However, Plaintiff does not  
plead facts to support such an agreement on the amount.

1 the plaintiff a bonus, it was not clear whether the parties agreed  
2 on the amount due. The court stated,

3 The agreement of the parties necessary to establish an  
4 account stated need not be express and frequently is  
5 implied from the circumstances. In the usual situation,  
6 it comes about by the creditor rendering a statement of  
the account to the debtor. If the debtor fails to object  
to the statement within a reasonable time, the law  
implies his agreement that the account is correct as  
rendered.

7 Zinn, 271 Cal. App. 2d at 600 (citation omitted); see also Maggio,  
8 Inc. v. Neal, 196 Cal. App. 3d 745, 753 (1987) (stating that in an  
9 action for an account stated, the "key element in every context is  
10 agreement on the final balance due"). Thus, in order to recover  
11 for an account stated, a plaintiff must show either an express or  
12 implied agreement on the amount due.

13 Because Plaintiff does not plead an express acknowledgment by  
14 ICD, it must allege an implicit agreement on amounts owed. ICD's  
15 failure to object to amounts on Plaintiff's invoices can establish  
16 such an implied agreement. ICD does not argue that it objected to  
17 the amount on any invoice and thus, on this motion, it appears to  
18 have agreed implicitly that it owed \$233,081.21. Plaintiff  
19 therefore states a claim for an account stated.

20 C. Claim on an Open Book Account

21 California law defines a book account as

22 a detailed statement which constitutes the principal  
record of one or more transactions between a debtor and a  
23 creditor arising out of a contract or some fiduciary  
relation, and shows the debits and credits in connection  
24 therewith, and against whom and in favor of whom entries  
are made, is entered in the regular course of business as  
conducted by such creditor or fiduciary, and is kept in a  
25 reasonably permanent form and manner and is (1) in a  
bound book, or (2) on a sheet or sheets fastened in a  
26 book or to backing but detachable therefrom, or (3) on a  
27 book or to backing but detachable therefrom, or (3) on a

1 card or cards of a permanent character, or is kept in any  
2 other reasonably permanent form and manner.

3 Cal. Civ. Proc. Code § 337a. A claim on an open book account, as  
4 with other common counts, is proper "whenever the plaintiff claims  
5 a sum of money due, either as an indebtedness in a sum certain, or  
6 for the reasonable value of services, goods, etc., furnished."

7 Kawasho Int'l, U.S.A. v. Lakewood Pipe Svc., Inc., 152 Cal. App. 3d  
8 785, 793 (1983); see also Gross Belsky Alonso LLP v. Henry Edelson,  
9 2009 WL 1505284, at \*7 (N.D. Cal.). Such a claim is "on the entire  
10 account and not upon the separate items." Rosati, 126 Cal. App. 2d  
11 at 56.

12 Plaintiff pleads that, within the past four years, ICD has  
13 become indebted to it "on an open book account for money due in the  
14 sum of at least \$233,081.21 . . ." Compl. ¶ 21. Plaintiff's  
15 claim on an open book account may go forward to the extent that the  
16 account meets the requirements under section 337a and the last  
17 entry contained therein is dated on or after January 22, 2006.

18 D. Claim for Goods Sold and Delivered

19 Plaintiff pleads that, within the past four years, ICD has  
20 "become indebted to Dreyer's for ice cream products sold and  
21 delivered in the sum of at least \$233,081.21, plus interest, for  
22 which ICD and Spin City agreed to pay the above sum." Compl. ¶ 24.  
23 However, Plaintiff does not plead that goods were actually sold and  
24 delivered on or after January 22, 2006. This claim is accordingly  
25 dismissed with leave to amend. Because Plaintiff has sufficiently  
26 stated its breach of contract and other common law claims, it may  
27 forgo amending its complaint.

## CONCLUSION

For the foregoing reasons, ICD's motion to dismiss is granted in part and denied in part. (Docket No. 10.) The Court's holdings are summarized as follows:

1. Plaintiff's claim for breach of contract may proceed based on its invoice of January 19, 2006, which was due on January 29, 2006. To the extent that the claim rests on invoices due before January 22, 2006, the Court concludes that the statute of limitations did not begin to run until Plaintiff failed to pay for its last invoice.
2. Plaintiff's states a claim for account stated based on its invoice of January 19, 2006, which was due on January 29, 2006.
3. Plaintiff's claim on a book account may go forward to the extent that the account meets the requirements of section 337a and the last entry on the alleged account is dated on or after January 22, 2006.
4. Plaintiff's claim for goods sold and delivered is dismissed with leave to amend to plead facts indicating that the goods were actually sold and delivered on or after January 22, 2006.

Within fourteen days from the date of this Order, Plaintiff may file an amended complaint to re-plead its claim for goods sold and delivered. If Plaintiff does so, Defendants may file a motion to dismiss two weeks thereafter, with Plaintiff's opposition due one week following and Defendants' reply due one week after that.

1 The motion will be decided on the papers.

2 IT IS SO ORDERED.

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4 Dated: May 14, 2010



5 CLAUDIA WILKEN  
6 United States District Judge

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